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OCTOBER TERM, 1974.

No. 74-375

SHELL CHEMICAL COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

TEAMSTERS LOCAL 676, ETC.,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business

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* This brief in support of the petition for a writ of certiorari is being filed with written consents of all parties to this proceeding. Pursuant to Supreme Court Rule 42(1), said written consents have been lodged with the Clerk of the Court.

firms and individuals and a direct business membership in excess of 38,000.

Most of the Chamber's membership is subject to the National Labor Relations Act and is frequently affected by the overwhelmingly coercive pressures involved in both issues presented to the Court for resolution by Petitioner.

First, with respect to the Section 10(k) issue, employers frequently find themselves caught in a vise between two unions competing for the same work. While Section 10(k) contemplates a procedure for alleviating the coercive injury to commerce involved in such jurisdictional disputes, a Board conclusion, after a § 10(k) hearing and full record, that no jurisdictional dispute exists, leaves the employer with no recourse whatsoever. Notwithstanding the finality of that administrative adjudication, which precludes commencement of an unfair labor practice proceeding, the lower court, in direct conflict with the Court of Appeals for the Ninth Circuit,[1] has held that this final adjudication of rights is not subject to judicial review under the Act. Thus, if the view of the lower court, in contrast to that of the Ninth Circuit, is to previal, an employer subject to a final administrative determination that there is no jurisdictional dispute, is not only subject to unlimited and potentially ruinous coercive picketing, but, concomitantly, is totally denied of any judicial review of that final substantive adjudication.[2]

Second, the *Fanelli Ford*[3] question—whether Section 8(b)(7) permits picketing by an uncertified or unrecognized union to force an employer to hire a discharged employee—is a matter of substantial concern to the Chamber's membership. *Fanelli Ford*, in the Chamber's opinion, represents a patent frustration of

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1. *Waterway Terminals Co.* v. *N. L. R. B.*, 467 F. 2d 1011 (9th Cir. 1972).

2. The question of whether the § 10(k) decision is an "adjudication" subject to the A. P. A., is presently pending before the court in No. 73-1313. See n. 4, *infra*.

3. *United Automobile Workers Local 259 (Fanelli Ford Sales, Inc.)*, 133 NLRB 1468 (1961).

the Congressional intent in enacting Section 8(b)(7) and an artificial device by which unions may engage in otherwise impermissible recognition picketing. This case represents the first opportunity in which this Court, since the 1959 addition of Section 8(b)(7) to the Act, will have an opportunity to consider this critical question.

REASONS FOR GRANTING THE WRIT

I. Uniform Administration of the National Labor Relations Act Requires That This Court Resolve the Conflict Between the Fifth and Ninth Circuits Governing Whether a Board § 10(k) Adjudication, After a Full Hearing, That There Is No Jurisdictional Dispute, Is Subject to Judicial Review Under Section 10(f) of the Act.[4]

So coercive are the effects of two unions pressuring an employer for the same work that Congress directed extraordinary relief be invoked by the Board to remove such obstructions to commerce: It not only commanded the Board to hold a hearing and make an assignment of the disputed work pursuant to Section 10(k), but it further commanded that the General Counsel seek immediate injunctive relief under Section 10(1) of the Act. See *N. L. R. B.* v. *Radio & Television Broadcasting Engineers* [*C. B. S.*], 364 U. S. 573, 579 (1961). Thus, under

4. The subject case subsumes the more circumscribed technical question of whether § 10(k) proceedings are "adjudicatory", and hence subject to the A.P.A. requirement of decision by an administrative law judge—the question now pending before the Court in *International Telephone and Telegraph Company* v. *Local 134, I. B. E. W.* (No. 73-1313, *cert. granted*, May 13, 1974). If the Court were to conclude in *I. T. & T.* that the § 10(k) proceeding was an "adjudication" within the meaning of the A. P. A., it would not have to reach, but should then consider, the broader question presented herein: whether § 10(k) determinations are subject to judicial review under Section 10(f) of the Act. Accordingly, since the subject case both encompasses the *I. T. & T.* issue and presents the broader and more critical question of the reviewability of § 10(k) determinations, it is respectfully suggested that the Court consolidate this case with *I. T. & T.* in order to thoroughly resolve in one decision both the nature of the § 10(k) proceeding and its reviewability.

the statutory scheme, the 10(k) hearing, which results in the finding of a jurisdictional dispute and award of the work, has two significant consequences. *First*, it is a condition precedent for an unfair labor practice proceeding under Section 8(b)(4)(D); and *second*, it, in effect, is dispositive of that subsequent unfair labor practice proceeding and consequent right of judicial review. This reality has been recently recognized by this Court: "the impact of the section 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding," *N. L. R. B.* v. *Plasters', etc. Union*, 404 U. S. 116 at 126-127. Of course, a *union* which disagrees with the *finding* of a jurisdictional dispute can simply proceed to the unfair labor practice proceeding, usually on the stipulated record made in the § 10(k) hearing (see *Plasters,' supra*, 404 U. S. at 126-127), and obtain judicial review of the unfair labor practice adjudication through Sections 10(e) or (f) of the Act. But, under the decision of the Court below, an *employer* who disagrees with the Board's *finding*, made after a full hearing and record, that there is no jurisdictional dispute is deprived of such judicial review. Having pursued every recourse open to him, he is thus placed, with the utmost of finality, right back where he started—subject to "pincer" pressure by unions vying for work, and no appellate court to turn to to test the propriety of the Board's adjudication of his rights.

In rejecting the Board's contention that a court of appeals lacks jurisdiction to review a Board § 10(k) order which finds no jurisdictional dispute to exist, the Ninth Circuit, in *Waterway Terminals*, rejected the very arguments which the lower court relied upon in the subject case to find an absence of jurisdiction.[5] This irreconcilable conflict, particularly in view of

5. In *Waterways Terminal* (467 F. 2d at 1015-1016), the Court rejected the Board's contentions that a 10(k) finding was not subject to judicial review assertedly because (1) it was not a final order resulting from an unfair labor practice proceeding; (2) it was analogous to the General Counsel's refusal to issue a complaint (a

the increasing significance of jurisdictional dispute resolution in the administration of the Act,[6] and the settled maxim that judicial review of final agency action should not be cut off "unless there is persuasive reason to believe that such was the purpose of Congress"[7], requires, it is submitted, that this Court grant certiorari to consider this important question.

II. The Lower Court's Endorsement of the Board's Fanelli Ford Doctrine Is a Patent Frustration of the Congressional Purpose in Enacting Section 8(b)(7), Which This Court Has Not Yet, But Should, Consider.

In 1959, when Congress added Section 8(b)(7) to the Act, with the intent of severely restricting recognitional picketing and its attendant interference with industrial peace,[8] it was well aware[9] of the then current status of Board law: that picketing to obtain reinstatement of a discharged employee is "necessarily . . . a strike to force or require the Employer to recognize and bargain with the Respondent as to this matter . . . recogni-

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situation, unlike the instant one, where there is no hearing and no record made); and (3) it was analogous to a representation case proceeding in which a union could not obtain review of an adverse Board unit determination, notwithstanding that representation cases are specifically excluded from the adjudicatory requirements of the Administrative Procedure Act, 5 U. S. C. § 554(a)(6).

6. 627 such 8(b)(4)(D) charges were filed with the Board during fiscal 1973 compared to 498 in fiscal 1968. 33rd Annual Report of N. L. R. B., Fiscal Year 1968 (G. P. O., 1969), p. 201; 38th Annual Report of N. L. R. B., Fiscal Year 1973 (G. P. O., 1973), p. 223.

7. *Abbott Laboratories, Inc.* v. *Gardner*, 387 U. S. 136, 150, 140 (1967).

8. "[Section 8(b)(7)] is remedial in character and is to be broadly construed to accomplish its intended purpose. . . . There is no doubt that the purpose of this legislation was to place a rather severe and drastic limitation on picketing other than informational. *Dept. Store Employees Union* v. *Brown*, 284 F. 2d 619, 626 (9th Cir. 1961).

9. See, *e.g.*, Shawe, *Federal Regulation of Recognitional Picketing*, 52 Geo. L. J. 248, 258 (1964).

tion and bargaining are essential elements of this objective without which it would be impossible for Respondent to satisfactorily settle its specific dispute." *Teamsters Local 656 (Lewis Food Co.)*, 115 NLRB 890, 892-893 (1956).

This rule was premised on important policy goals—where, as in the present case, the employer is already organized, picketing to obtain reinstatement both "tends to interfere with the functions of the proper bargaining agent" and "may raise the same problems—interference with employee free choice and the imposition of inconsistent restraints on the employer—as does picketing for recognition." Comment, *Illegal Picketing Under Section 8(b)(7)—A Reexamination*, 68 Col. L. Rev. 745, 753 (1968). Nevertheless, the Board thereafter emasculated the Congressional intent by expressly overruling *Lewis Food* and holding, in *Fanelli Ford*, that picketing for reinstatement of an employee is *not* recognitional in objective, and therefore not violative of Section 8(b)(7). Thus, while *Lewis Food* was consonant with the § 8(b)(7) proscription against picketing which had recognition as *an* object, *Fanelli Ford* emasculated the statute by requiring recognition be proven to be *the* object —a situation which is almost impossible to demonstrate given the ease by which unions can mask the real purpose of their picketing.[10] ~~*Fanelli Ford* is thus a patent example of what the authors of the Landrum-Griffin amendments have termed "the pattern of recent decisions of the National Labor Relations Board . . . [which] operate to legalize many of the picketing~~

10. *Fanelli Ford* thus provides unions with a ready device, through self-serving statements and artfully-worded picket signs, to circumvent Section 8(b)(7). It will ordinarily be impossible, for the employer to produce evidence to show that such picketing ultimately, if not presently, had a recognitional purpose; As one commentator observed: "All the union had to do to avoid violating the section [8(b)(7) prohibitions] was to cover its tracks carefully . . . It could begin its picketing with signs directed towards one of the legal objects and refrain from outward attempts to organize or gain recognition; the message would get through to his employees, but they would not be able to prove anything." Comment, 68 Col. L. Rev. at 752.

~~abuses which Congress, through the Landrum-Griffin Act, sought to eliminate." 108 Cong. Rec. No. 55, 87th Cong. 2nd Sess., pp. 5700, 5703, quoted in Browne, *The National Labor Relations Board: Labor Law Rewritten*, 49 A. B. A. 64, 67 (1967).~~

The present case, moreover, presents a rare opportunity for the Court to consider the *Fanelli Ford* issue: Few employers are able to withstand such coercive conduct; in practice, the § 8(b)(7) charges are filed and the employer, unable to withstand the picketing, withdraws the charge at the union's insistence during bargaining. This case, therefore, is an appropriate vehicle to review and correct this significant dislocation in national labor policy. *Fanelli Ford* is thus a patent example of what the authors of the Landrum-Griffin amendments have termed "the pattern of recent decisions of the National Labor Relations Board . . . . [which] operate to legalize many of the picketing abuses which Congress, through the Landrum-Griffin Act, sought to eliminate." 108 Cong. Recc. No. 55, 87th Cong. 2nd Sess., pp. 5700, 5703, quoted in Browne, *The National Labor Relations Board: Labor Law Rewritten*, 49 A. B. A. 64, 67 (1967).

This reversal of the Board's position, now endorsed by the lower court, presents an important question in the administration of the Act which this Court has not, but should, consider.[11]

11. *Fanelli Ford* ignores the reality of picketing to obtain reinstatement of a discharged employee. The propriety of a discharge, or the conditions invoked in reinstatement, are frequently the subject of contractual grievance-arbitration disputes, an implicit acknowledgment that such controversies are part and parcel of the continuing collective bargaining process and of vital concern to the designated employee representative. See, *e.g.*, *Aeronautical Industrial District Lodge 7270* v. *Campbell*, 337 U. S. 521, 525 (1949); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965). The terms of the reinstatement desired by the picketing union are integrally intertwined with the prevailing wages and conditions of the employee. The employer, for example, may be unwilling to reinstate a discharged employee with seniority, or with seniority over replacements, or to the same job as he occupied prior to the discharge, or subject to a particular wage rate. The union's objective, conversely, is, by means of its picketing, that of forcing "the employer to bargain

CONCLUSION

For the reasons stated herein, as well as those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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about its demands or . . . [of] presenting its demands on a 'take-it-or-leave-it' basis, which, after all, is a venerable bargaining technique of some unions . . ." Shawe, 52 Geo. L. J. at 257. The employee must either meet these demands or, if *Fanelli Ford* is correct, face protracted and perhaps ruinous picketing. This was the salient theme of *Lewis Food;* it is a principle which, to update Board Member Rodgers dissent in *Fanelli Ford,* is "just as sound today in [1974] as it was in 1956 when the Board decided [Lewis Food] . . ." 133 NLRB at 1469.